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No. 88-284

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IN THE

Supreme Court of the United States

October Term, 1987

DAIN BOSWORTH INCORPORATED,
Petitioner,

vs.

DAVID S. JOHNSON, KENNETH E. CARTER AND SHIRLEY R. CARTER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTION PRESENTED

Whether a predispute agreement to arbitrate disputes between a securities broker and investor is enforceable with respect to claims brought under Section 12(2) of the Securities Act of 1933, 15 USC §77 1.

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STATEMENT OF THE CASE

Respondents are individual investors who have suffered substantial financial losses as a result of investing in securities of Kroy Incorporated. Respondents' investments in Kroy Incorporated were solicited by Petitioner's registered representative, Michael O'Brien. Respondents commenced this action against Petitioner and O'Brien alleging violations of Section 12(2) of the Securities Act of 1933, 15 USC §771(2).

Petitioner moved the trial court to compel arbitration of Respondents' claims based upon a predispute arbitration

clause contained in Petitioner's non-negotiated Margin Agreements signed by Respondents. The trial court, relying upon this Court's holding in *Wilko v. Swan*, 346 U.S. 427 (1953), denied Petitioner's motion. The Minnesota Court of Appeals affirmed the trial court, 420 NW2d 264 (Minn. App. 1988) and the Minnesota Supreme Court in an unpublished order declined to review the decision of the Minnesota Court of Appeals.

Petitioner seeks a Writ of Certiorari from this Court arguing that the recent decision of *Shearson/American Express, Inc. v. McMahon*, — U. S. —, 107 S. Ct. 2332 (1987) requires arbitration of Respondents' Section 12(2) claims.

ARGUMENT AGAINST GRANTING THE WRIT

The *Wilko* holding has been followed and relied upon for over 30 years; the decision is predicated upon a determination that the non waiver provisions of Section 14 of the Securities Act of 1933 precluded enforcement of predispute arbitration agreements.

Petitioner's assertion that the *McMahon* decision undermines *Wilko* is without merit. *McMahon* merely declined to extend the holding of *Wilko* to claims brought under the Securities Exchange Act of 1934. This Court properly refused to overrule *Wilko* and its application to claims brought under the Securities Act of 1933. Consequently *Wilko* continues to mandate that predispute arbitration agreements are not enforceable with respect to claims brought under the Securities Act of 1933.

Wilko determined that Congress intended that Section 14 of the Securities Act of 1933 precluded enforcement of predispute arbitration agreements with respect to claims

brought under the 1933 Act, 346 U. S. at 437. Congress has not amended Section 14 of the Securities Act of 1933 since *Wilko* was decided and the intent of Congress necessarily remains unchanged.

The *McMahon* decision recognized that the "Arbitration Act's mandate may be overridden by a contrary congressional command," 107 S. Ct. at 2337 and acknowledged that the application of the Arbitration Act (9 U.S.C. §1 et. seq.) may be defeated by demonstrating that Congress intended an exception to the Arbitration Act for the particular claim in question. *Wilko* establishes that Congress intended an exception to the Arbitration Act for claims brought under §12(2) of the Securities Act of 1933. Indeed, *McMahon* suggests Congress reaffirmed its intent that predispute arbitration agreements are not enforceable with respect to the Securities Act of 1933 by the reference to *Wilko* in the conference report regarding amendments to Section 28 of the Securities Act of 1934: ". . . the committee may simply have wished to make clear that the amendment to §28(b) was not otherwise intended to affect *Wilko's* construction of the Securities Act," 107 S. Ct. at 2343.

The *McMahon* decision (upon which Petitioner relies in seeking this writ), contrary to Petitioner's arguments, does not undermine the *Wilko* decision. McMahon refused to overrule *Wilko* and recognized a 1975 Congressional affirmation of the application of the *Wilko* decision to claims brought under the Securities Act of 1933.

CONCLUSION

This court should not disregard the reliance placed upon the *Wilko* decision for over 30 years and ignore the recent Congressional expression of support for the *Wilko* decision found in the legislative history of the 1975 amendments to the Securities Exchange Act of 1934. This court properly declined to overrule *Wilko* in the *McMahon* decision and should resist Petitioner's present assault against *Wilko* by denying the Writ of Certiorari.

Dated: September 7, 1988.

Respectfully submitted,

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